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No. 03-1282

IN THE

Supreme Court of the United States

HEALTH PLAN SERVICES, INCORPORATED, individually and as successor in interest to Third Party Claims Management Incorporated, *et al.*,
Petitioners,

v.

MARY B. GUNNELLS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
I. THIS CASE PRESENTS THE PRIME VEHICLE FOR THE COURT'S RESOLUTION OF THE CIRCUIT CONFLICT REGARDING THE APPLICATION OF THE PREDOMINANCE REQUIREMENT IN RULE 23(B)(3) IN THE CONTEXT OF RULE 23(c)(4)(A)	1
II. RESPONDENTS FAILED TO ADEQUATELY ADDRESS THIS COURT'S RECENT CLASS ACTION RULING REGARDING THE MANAGEABILITY TOOLS IN RULE 23	5
CONCLUSION	6

TABLE OF AUTHORITIES

CASES	Page
Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997)	5, 6
Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996)	2
Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)	6
Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996)	3

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STATEMENT OF THE CASE

I. THIS CASE PRESENTS THE PRIME VEHICLE FOR THE COURT'S RESOLUTION OF THE CIRCUIT CONFLICT REGARDING THE APPLICATION OF THE PREDOMINANCE REQUIREMENT IN RULE 23(B)(3) IN THE CONTEXT OF RULE 23(c)(4)(A).

As even Respondents recognize in their brief to this Court, there is "undeniably" a split between the Fifth and Ninth Circuits regarding the application of Rule 23(b)(3) in the context of Rule 23(c)(4). (Br. in Opp. 13) When the Fourth Circuit determined that the common issues pursuant to (c)(4)

could be severed *before* undertaking the predominance analysis required by (b)(3), the Fourth Circuit emerged directly in the midst of this conflict, further deepening the circuit split. The Fourth Circuit's and Respondents' contention to the contrary is flatly wrong. Class certification in this case could not be maintained if the predominance inquiry employed by the Fifth Circuit had been followed. As a result, this case presents the optimal vehicle for this Court to resolve this immensely important issue.

The dissent below, the United States Chamber of Commerce, the National Home Equity Mortgage Association and Petitioner have all demonstrated unequivocally in an opinion and prior briefings to this Court that the Fourth Circuit majority's opinion directly conflicts with prior decisions of this Court and the Fifth Circuit on this issue with great social and economic consequences.[1] The Fifth Circuit has unambiguously rejected an issue by issue predominance analysis, as undertaken by the Fourth Circuit, in favor of a predominance inquiry into an action "as a whole." *Castano v. Am. Tobacco Co.*, 84 F.3d 734,745 n.21 (5th Cir. 1996). The Fourth Circuit's artificial search for predominance *after* severing the uncommon issues is precisely the "nimble use" of Rule 23(c)(4) that *Castano* struck down. *Id.*

The Fourth Circuit readily admitted that it hand picked what it believed to be common issues pursuant to (c)(4), *then* conducted a predominance inquiry. The Fifth Circuit requires the predominance analysis to be anchored to an action "as a whole," uncommon and common issues *included*. *Id.* at 745 n.21. However, by severing the individual issues first, the "whole" action, under any theory of an action, simply cannot

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[1] Petitioner's Brief at 17-21; Appendix to Petition for Writ of Certiorari ("App.") at 71a; Brief of Amicus Curiae Chamber of Commerce of the United States at 1, 4, 7, 9; Brief of Amicus Curiae National Home Equity Mortgage Association at 1-3.

be analyzed as the only issues remaining for review are the common ones. The Fourth Circuit ensured "that the predominance of a selected issue is a foregone conclusion, since the common question of law or fact would always predominate over the individual issues that are not a factor." (App. at 82a)

Respondents' and the Fourth Circuit's claims that the opinion on appeal is not in conflict with the Fifth Circuit is a thin attempt to disguise the obvious analysis and finding to the contrary. There can be no doubt that the Fourth Circuit has followed the Ninth Circuit's liberal interpretation of Rule 23. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996)(even where predominance is not found, a court may isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these issues). As the Chamber of Commerce correctly argues, "[w]ith its holding that the predominance requirement need not be satisfied at the threshold, the Fourth Circuit has stepped foursquare into the conflict" between the Fifth and Ninth Circuits. (Br. Chamber of Commerce at 7)

The Fourth Circuit further advances its misapplication of the Fifth Circuit's cases by invoking a confusing use of the words "cause of action." The Fourth Circuit affirmed certification of the general question: whether TPCM violated certain duties, causing the Plan's failure and directly injuring the plaintiffs. The Fourth Circuit then characterized this question as one "cause of action," declared that its action "predominate[s] over the individual issues involved *in that cause of action*." (App. at 61a n.16) Respondents ignore, as did the Fourth Circuit, the fact that this "cause of action" is actually an amalgam of highly individualized claims that will require an individual inquiry into causation, liability and damages. Significantly, this suspect "cause of action" does not include any of the seven claims actually pled by Respondents.

The Fourth Circuit's argument as to what constitutes a "cause of action" in this lawsuit is a red herring. There is *no* cause of action, under any definition, in the instant case where the certified question predominates. Respondents sidestep this issue in their brief by attempting to conveniently collapse the requirements of predominance and superiority into a singular test, asserting merely that the class action tool is a superior method of adjudicating the certified question. Respondents cannot represent to this Court that the proper predominance inquiry was undertaken by the Fourth Circuit, which would have called for comparing the now certified singular question to the numerous individual questions relating to both liability and damages.

Respondents have now promised to amend their complaint (for what would be the third time in this litigation) to fit more neatly within the cause of action articulated by the Fourth Circuit and dismiss the direct claims against TPCM, only pursuing the indirect claims. Respondents' promise to amend stops just short of admitting that the question certified does not relate back to any particular claim pled thus far. Such an amendment will not alleviate the impropriety of this class certification for the same reasons the Fourth Circuit's "cause of action" fails to pass the predominance test. At the heart of this lawsuit, whether couched in the Fourth Circuit's "cause of action" or the Respondents ever-changing theories of this case, are individual issues that Judge Niemeyer correctly observed clearly predominate over the issue certified by the Fourth Circuit, particularly with respect to individual issues of liability and damages.[2]

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[2] Petitioners contest Respondents' characterization of the facts, which Petitioners assert are misleading to this Court. As an example, even the district court recognized that a damages determination alone may not be ministerial and will require 1,400 mini-trials. (App. 152a-154a)

Ultimately, if the proper predominance analysis had been undertaken by the Fourth Circuit majority with respect to the entire lawsuit or with respect to any claim actually pled, no predominance would have been found. Without a proper predominance finding, this class cannot be maintained. Respondents' assertion that predominance exists under either the Ninth Circuit's or the Fifth Circuit's analysis simply endorses the Fourth Circuit's erroneous position that predominance was not, in fact, manufactured by the Fourth Circuit's improper "nimble" use of Rule 23(c)(4). The Fourth Circuit's attempt to liken its analysis to that of the Fifth Circuit rests on wordplay, not on a solid analysis supported by the actual claims and facts of this case. There can be no question that the Fourth Circuit has contributed significantly to a circuit split with the Fifth Circuit on this critical issue, which, as articulated by amici, involves widespread social and economic implications and an immediate severe impact on TPCM.

II. RESPONDENTS FAILED TO ADEQUATELY ADDRESS THIS COURT'S RECENT CLASS ACTION RULING REGARDING THE MANAGEABILITY TOOLS IN RULE 23.

In their response, Respondents gave passing reference to this Court's ruling in *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).[3] Yet they failed to address the central point

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[3] Respondents accuse Petitioners of ignoring *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), a case involving this Court's review of a certification of a settlement class under Rule 23(b)(1)(B). This Court held that certification of a mandatory settlement class on a limited fund theory requires a showing that the fund is limited independently of the agreement by the parties. Respondents have failed to articulate the relevance of *Ortiz* to the analysis in this case. The only tenet that appears relevant from *Ortiz* is this Court's reiteration that the "Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the Rules can ignore the Act's mandate that 'rules of procedure' shall not abridge,

of this Court's holding in that case: Even in the context of Rule 23(e), which allows settlement only classes, the predominance requirement *must* be met and deserves "undiluted, even heightened attention" when invoking the class action management devices set forth in Rule 23. Id. at 620, 623. As previously articulated to this Court, such is clearly analogous to an analysis under Rule 23(c)(4)(a), which, like Rule 23(e), is a class action management tool. (App. at 81a; Br. Chamber of Commerce at 9) In contravention of *Amchem*, Respondents now seek to have this Court sanction the Fourth Circuit majority's legitimization of an otherwise uncertifiable class in an effort to try to force Petitioners into settlement.

CONCLUSION

The Fourth Circuit majority's ruling below undeniably forces this case into the arena of a very important conflict in the federal circuits. The ruling deepens the conflict and presents this Court the perfect opportunity to resolve the issue once and for all. By determining the predominance inquiry need not be undertaken prior to severing issues for an issue-only class, the Fourth and Ninth Circuits have impinged on fundamental fairness in their zeal to coerce settlement or attempt to promote the efficient disposition of cases. Ironically, as passionately stated by the dissent below, the Fourth Circuit majority's ruling does nothing to promote efficient disposition of this case. Additionally, since this case has been certified, Petitioners are under immense pressure to settle what they believe to be a very defendable case on the merits.[4]

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enlarge or modify and substantive right." *Ortiz*, 527 U.S. at 845. Petitioners assert that the current analysis used by the Fourth Circuit in the context of Rule 23(c)(4) plainly does abridge Petitioners' rights.

[4] While Petitioners do not believe this is the proper instance to delve into the merits of the case, Petitioners strenuously dispute the facts as set forth in Respondents' brief, facts notably in most instances without any support or reference. There is, in fact, a vast amount of evidence in the

The Fifth Circuit properly refused to allow cases in its circuit to fall under the siege of this blackmail. Had the Fourth Circuit and the district court in the instant case followed the Fifth Circuit, the analysis would have revealed a morass of highly individualized issues to prove liability alone that do not predominate under any theory or claim advanced by Respondents. As adeptly articulated by amici, the stakes are too high to allow this issue to simmer further. The instant case is the optimal vehicle for adjudicating this issue and granting Petitioners' request for certiorari.

Respectfully submitted,

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record to the contrary demonstrating the need for an individual analysis as to liability and damages, as recognized by the dissent.